Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED TRANSPORTATION UNION,
Petitioner,

v.

HONORABLE RODNEY SLATER, *et al.*,
Respondents.

and

NORFOLK AND WESTERN RAILWAY COMPANY,
Intervenor on Appeal.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

CLINTON J. MILLER, III
General Counsel
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

LAWRENCE M. MANN *
ALPER, MANN & WEISBAUM, P.C.
1730 K Street, N.W.
Suite 1107
Washington, D.C. 20006
(202) 298-9191

* Counsel of Record

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QUESTION PRESENTED

Since the Federal Railroad Administration does not have general rulemaking authority under the hours of service laws, did the FRA exceed its authority by promulgating a regulation covering reconstruction of railroad sleeping quarters?

LIST OF PARTIES

The following parties appeared before the Court of Appeals:

Petitioner:

United Transportation Union

Respondents:

Honorable Rodney Slater, Secretary of Transportation; United States Department of Transportation; Honorable Jolene Molitoris, Federal Railroad Administor; Federal Railroad Administration.

Intervenor on Appeal:

Norfolk and Western Railway Company, (a wholly owned subsidiary of Norfolk Southern Corporation).

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PETITION FOR A WRIT OF CERTIORARI

The United Transportation Union respectfully petitions for this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The ruling at issue here, of the United States Court of Appeals for the Eighth Circuit, is attached hereto. Appendix A, 1a-8a (hereinafter "App. ——").

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered on July 16, 1998. The mandate of the court was issued on September 11, 1998. App. B, 9a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Hours of Service Act (hereinafter "HSA") was amended by Congress in 1976 to protect employees who are required to stay in sleeping quarters provided by railroads at or near yards where there is switching of rail cars. It provided:

> Employees' hours of service
>
> (a) Limitations
>
> It shall be unlawful for any common carrier, its officers or agents, subject to this chapter—
>
> (1) . . . .
>
> (2) . . . .
>
> (3) to provide sleeping quarters for employees (including crew quarters, camp or bunk cars, and trailers) which do not afford such employees an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters; or
>
> (4) to begin construction or reconstruction of any sleeping quarters referred to in paragraph (3), on or after July 8, 1976, *within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary)* of any area where railroad switching or humping operations are performed. (Emphasis added).

49 U.S.C. § 62 (repealed 1994)

In 1994, Congress codified the transportation safety laws. The codification legislation makes it clear that the

new law was not intended to make any substantive changes to what existed at the time of its passage. (*See* H.R. Rep. No. 180, 103d Cong., 1st Sess. 5 (1993). The new statutory provision appears at 49 U.S.C. § 21106 as follows:

A railroad carrier and its officers and agents—

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976 construction or reconstruction of sleeping quarters referred to in clause (1) of this section *in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation,* in which railroad switching or humping operations are performed. (Emphasis added).

49 U.S.C. § 21106 (1994)

REGULATION INVOLVED

The relevant regulation provides:

§ 228.101 Distance requirement; definitions.

(a) The Hours of Service Act, as amended (45 U.S.C. 61-64b), makes it unlawful for any common carrier engaged in interstate or foreign commerce by railroad to begin, on or after July 8, 1976, the construction or reconstruction of sleeping quarters for employees who perform duties covered by the act "within or in the immediate vicinity (as determined in accordance wth rules prescribed by the Secretary of Transportation) of any area where railroad switching or humping operations are performed." 45 U.S.C. 62(a)(4). This subpart sets forth (1) a general

definition of "immediate vicinity" (§ 228.101(b)), (2) procedures under which a carrier may request a determination by the Federal Railroad Administration that a particular proposed site is not within the "immediate vicinity" of railroad switching or humping operations (§§ 228.103 and 228.105), and (3) the basic criteria utilized in evaluating proposed sites (§ 228.107).

(b) Except as determined in accordance with the provisions of this subpart. "The immediate vicinity" shall mean the area within one-half mile (2,640 feet) (804 meters) of switching or humping operations as measured from the nearest rail of the nearest trackage where switching or humping operations are performed to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations.

(c) As used in this subpart—

(1) Construction shall refer to the—

(i) Creation of a new facility;

(ii) Expansion of an existing facility;

(iii) Placement of a mobile or modular facility; or

(iv) Acquisition and use of an existing building.

(2) Reconstruction shall refer to the—

(i) Replacement of an existing facility with a new facility on the same site; or

(ii) Rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

49 C.F.R. § 228.101 (1998).

STATEMENT OF THE CASE

This case presents a classic example of a matter that warrants the grant of certiorari. There exists a split in three federal circuits regarding the scope of authority of the Federal Railroad Administration (hereinafter "FRA") to promulgate regulations under the Hours of Service Act (hereinafter "HSA"), and it involves a serious railroad safety matter.

On or about April, 1996, the Petitioner learned that the Norfolk and Western Railway Company was planning a major reconstruction of its sleeping quarters located in its railroad yard at Moberly, Missouri. The said facility is more than 30 years old and is in a dilapidated condition. The sleeping quarters contains 20 rooms for use by employees represented by Petitioner. At various times during 1996, the Petitioner informed the FRA that Petitioner opposed the remodeling on both safety and statutory grounds. *See* App. C, 10a-11a. The FRA responded to Petitioner on February 27, 1997. App. D, 12a-15a.

It is undisputed that the railroad intends to begin a major reconstruction of its sleeping quarters located at the railroad's Moberly, Missouri railroad yards. The sleeping rooms will get new ceilings, beds, paint, room darkening shades, new windows, all doors will be replaced, and the upstairs will be replaced with individually controlled heating and air conditioning units in each room. The shower areas will be redesigned to include an additional shower and private dressing rooms for each shower, new ceilings, exhaust fans, toilets, stalls, sinks, mirrors, an additional bathroom for female employees, and additional electrical outlets. Appliances in the kitchen will be replaced, a fire suppression system will be installed, and the restaurant will be renovated. Hallway and stairway doors will be replaced and additional doors will be added to insulate the sleeping rooms from noise, carpet runners in the hallways will be installed, and the ceiling and light fixtures in the hall will be replaced. The

recreation area will be painted, the washroom will have a new toilet and ceiling installed, and the locker room will be painted. The central air conditioning units in the recreation room and the restaurant will be replaced and moved into the boiler room. Lastly, the exterior of the building will be painted, the guard rail will be removed, and a fence will be placed around the dumpster area. J.A. 54-55; *see also* J.A. 52.[1]

The estimated cost of the reconstruction is $229,500.00. J.A. 49-50. In 1997, the Randolph County, Missouri Assessor appraised the current building at $129,337.00, and the land is appraised for an additional $50,000.00. J.A. 91-93. The sleeping quarters are located within 95 feet of a main rail line J.A. 64, and within 150-200 feet of a major public crossing. J.A. 45, 64. Switching of railroad equipment, including hazardous materials, commonly occurs in the yards which are located nearby.

As pointed out in *United Transportation Union v. Dole*, 797 F.2d 823 (10th Cir. 1986), the impetus for amending the HSA came from two major accidents in the mid 1970's where explosions in rail yards involving hazardous materials being switched resulted in numerous deaths:

> With the Hours of Service Act, Congress intended to improve the safety of sleeping accommodations that railroads provided for crews. Impetus for strengthening the safety standards in 1976 came from two accidents in the mid-1970s, where explosions in rail yards involving hazardous substances being switched, claimed the lives of trainmen and injured hundreds of employees and townspeople. As part of these new remedial provisions, railroads were required to maintain sleeping facilities for crews no closer than one-half mile to any area where switching or humping operations were performed. 45 U.S.C. § 62(a)(4) and 49 C.F.R. § 228.101(b) (1985).

Id. at 825.

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[1] The citation "J.A." refers to the Joint Appendix in the Eighth Circuit.

On May 15, 1976, the House Committee on Interstate and Foreign Commerce favorably reported the legislation referred to above. H.R. Rep. No. 94-1166, 94th Cong., 2d Sess. (1976) (hereinafter "H.R. Rep."). It noted the explosion in the rail yards at Decatur, Illinois on July 19, 1974, where 7 employees were killed and over 100 were injured.[2] H.R. Rep. at 11. The tank car rupture demolished the crew quarters and the eating facility in the middle of the yard. The Committee also pointed out that the labor organizations had filed a petition with the FRA in August 1974, to require every railroad to move its sleeping quarters at least one mile away from its yards, where switching or humping is performed. Concerning the previously mentioned failure of FRA to act on the petition, the Committee said, "Because of FRA's inaction, the Committee feels it must take initiative to protect workers who are forced to sleep in the railroad yards." H.R. Rep. at 11.

For the purposes of this litigation, it is significant that the only specific authority given to the Secretary by Congress is in setting the *specific distance* that a sleeping quarters must be away from switching operations. There is no other discussion anywhere in the legislative history, nor in the statute, which gives the Secretary any other rulemaking authority.[3]

In adopting the crew quarters legislation, Congress did not place a specific mileage limitation on the location of the sleeping quarters. The House Committee, in specifically limiting the Secretary's rulemaking authority, stated that "[t]he Secretary, after appropriate rulemaking, may determine that sleeping quarters shall be a specific dis-

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[2] In fact, over 300 persons were injured. See 41 Fed. Reg. 53028 (1976).

[3] The Senate Committee on Commerce did not have an opportunity to address the merits of this amendment because of the Budget Act's statutory deadline to report all authorizations for fiscal year 1977, by May 15, 1976. S. Rep. No. 855, 94th Cong., 2d Sess. 3 (1976).

tance away from the area of switching." H.R. Rep. at 11. Nowhere does the House Report discuss giving the FRA the power to promulgate regulations defining construction or reconstruction, nor to define "crew quarters." The singular power the House Report discusses in regard to the Secretary's power is to determine "specific distance."

Additionally, the Committee required that sleeping quarters for employees must be provided which "afford such employees an opportunity for rest free from interruption caused by noise under the control of a railroad, and the quarters must be clean, safe, and sanitary." H.R. Rep. at 11. The Committee said the matter of what was clean, safe, and sanitary means that it should be "free from rats, roaches, and other vermin." H.R. Rep. at 12.

The HSA amendments became effective on July 8, 1976. The FRA then published interim rules covering these amendments at 41 Fed. Reg. 53028 (1976). Concurrently, a Notice of Proposed Rulemaking was issued with respect to the interim rules adopted on the same date. 41 Fed. Reg. 53070 (1976). A public hearing on the NPRM was held on March 1, 1977. The final rule was published on July 19, 1978. 43 Fed. Reg. 31006 (1978.)

It is important that, in each of the above rulemaking proceedings, the FRA accurately repeated the limited scope of its authority, but then issued rules far beyond the limited authority given to it by Congress. The FRA said in its preamble to the initial rulemaking proceeding:

> The new provision, which became effective on July 8, 1976, makes it unlawful for any common carrier by railroad to begin construction or reconstruction of sleeping quarters for employees covered by the Act, after the effective date of the provision, *within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary)* of

any area of railroad switching or humping operations are performed.

41 Fed. Reg. 53028 (1976) (Emphasis added).

Substantially the same quoted wording is repeated at 41 Fed. Reg. 53070-71 (1977), 42 Fed. Reg. 27895 (1977), and 43 Fed. Reg. 31006 (1978).

The significant error by the Eighth Circuit was its upholding the regulation despite the fact that the FRA had been given very limited regulatory authority. The FRA was given authority only to consider whether or not the sleeping quarters are within or in the immediate vicinity where switching or humping operations occur, and nothing else. Despite such statutory limits on its rulemaking authority under the HSA, the FRA promulgated broad sleeping quarters rules, which included defining *construction and reconstruction*, at issue in this case.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE SCOPE OF POWERS OF THE FEDERAL RAILROAD ADMINISTRATION TO PROMULGATE REGULATIONS UNDER THE HOURS OF SERVICE ACT.

The Seventh, Eighth and Tenth Circuits have reached differing conclusions regarding the powers of the FRA to promulgate regulations under the HSA.

A. The Eighth Circuit Has Concluded That Even Though the Railroad Violated the "Spirit" of the Hours of Service Act in Renovating the Sleeping Quarters at Moberly, Missouri, Under the Court's Doctrine in Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984), the Federal Railroad Adminstration's Regulations Are Given Controlling Weight.

B. The Tenth Circuit Has Concluded That Under the Hours of Service Act, a Railroad Should Make No Significant Additional Investment in Sleeping Quarters Near Hazardous Railroad Switching or Humping Operations After July 1976.

In *United Transportation Union v. Dole*, 797 F.2d 823 (10th Cir. 1986), Judge Logan, concurring in the opinion of the court, stated that Congress, in enacting § 21106(2), was frustrated with FRA's "earlier inaction on safety matters," and, consequently, intended "that a railroad should make no significant additional investment in sleeping quarters near hazardous railroad switching or humping operations after July, 1996." *Id.* at 832.

C. The Seventh Circuit Has Ruled That the Federal Railroad Administration's Interpretation of the Hours of Service Act Was Entitled to No Deference, and That the Federal Railroad Administration Has Not Been Granted General Rule-Making Authority by Congress.

The Eighth Circuit is also in conflict with the Seventh Circuit. The latter court, in *Atchison, Topeka and Santa Fe Railway Co., v. Pena*, 44 F.3d 437 (7th Cir. 1994), *aff'd*, 516 U.S. 152 (1996), concluded that FRA's interpretation of the HSA was entitled to no deference.[4] *Id.* at 439, 445. The court stated:

> While the Hours of Service Act is not unambiguous, the FRA's interpretation is not entitled to the gen-

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[4] Although the Seventh Circuit was interpreting a different section of the HSA in that case, the extent of the FRA powers was at issue.

> erous treatment afforded agency interpretations under *Chevron*. Both the railroads [5] and the FRA agree on an important point: that the FRA has not been granted rule-making authority by Congress. The Supreme Court made clear in *Chevron*, 467 U.S. at 843-44, that only statutory interpretations by agencies with rule-making powers deserve substantial deference."

Id. at 441.

The Court, in affirming the judgment of the Seventh Circuit, stated that it granted certiorari in the case "[b]ecause of the importance of uniform nationwide application of the HSA's regulatory scheme. . . ." *Pena*, 516 U.S. at 156. The divergent views of the three circuits certainly do not lend themselves to a uniform application of the HSA's regulatory scheme.

It is undisputed that the FRA does not have general rulemaking authority under the HSA. This was conceded in the Seventh Circuit case, *Pena*, 44 F.3d at 441. The FRA has sought such authority from Congress on various occasions, and has not been granted.

In prepared testimony during the current Congress, the respondent FRA Administrator again stated that "FRA lacks the regulatory authority . . . to address hours of duty of safety-sensitive employees." She also acknowledged that FRA had sought regulatory authority over the areas of hours of service in 1991 and 1994. *Reauthorization of the Federal Railroad Administration: Hearings before the Subcommittee on Railroads of the Senate Committee on Transportation and Infrastructure*, 105th Cong., 2d *Sess.* (1998) (hereinafter *1998 Hearings*). *See also Railroad Safety and H.R. 4545: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 103d

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[5] It should be noted that the Norfolk and Western Railway Company, respondent in the present litigation was one of the petitioner railroads in that case.

Cong., (1994); *Oversight and Reauthorization of Rail Safety Programs and S. 2132, The Federal Railroad Safety Authorization Act: Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation*, 103rd Cong., 2d Sess. 10 (1994); *Railroad Safety Programs (Part 2): Hearings Before the Subcommittee on Transportation of Hazardous Materials of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. 42 (1992); *Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 102d Cong., 1st Sess. 57-58 (1991).

The relevant provision of the statute grants FRA authority only to issue regulations determining the "immediate vicinity of an area." 49 U.S.C. § 21106(2). Nevertheless, the FRA promulgated regulations defining "reconstruction." 49 C.F.R. § 228.101. On this point, the Eighth Circuit concluded that it did not agree with the Petitioner's reading of the statute. App. A at 6a.

The cardinal rule of statutory construction is to enforce the plain language of the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Whether the language is plain is "determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

Agency power is "not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (quoting *Manhattan General Equipment Co. v. Commission*, 297 U.S. 129, 134 (1936)). The issue is correctly framed as whether Congress intended to delegate such jurisdiction to the FRA. *See Bowen v. Georgetown Uni-*

versity Hospital, 488 U.S. 204, 108 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *INS v. Chadha*, 462 U.S. 919, 953 n.16, 955 n.19 (1983) (agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review," and "Congress ultimately controls administrative agencies in the legislation that creates them"). This fundamental misconception by the Eighth Circuit regarding this principle of law skewed its analysis.

The Eighth Circuit stated that it relied on *Chevron* for its decision to uphold FRA's regulation. Under *Chevron*, however, the intent of Congress must first be examined, because "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. "It is only if the intent of Congress is ambiguous that we defer to a permissible interpretation by the agency." *Chevron*, 467 U.S. at 843. The Court has stated that "[a] precondition to deference under *Chevron* is a Congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

No deference is due the FRA's construction of the HSA unless it acts within the bounds of its Congressionally-established authority. Ascertaining Congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction. *See, e.g., Adams Fruit Co.*, 494 U.S. at 650 (quoting *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 745 (1973) ("An agency may not bootstrap itself into an area in which it has no jurisdiction"); *ACLU v. FCC*, 823 F.2d 1554, 1567 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) ("When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis

of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue"); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) ("The more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission").

The recognized standard for the construction and application of referential and qualifying words appears in *Sutherland Statutory Construction*:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence'. Thus a proviso usually is construed to apply to the provision or clause immediately preceding it.

2A Norman J. Singer, *Sutherland Statutory Construction* § 47.33 (5th ed. 1992)

Applying that rule to the statute at issue, the words "area or in the immediate vicinity of an area" are immediately followed and modified by the clause "as determined under regulations prescribed by the Secretary of Transportation".[6] It does not modify construction, reconstruction, or crew quarters. It modifies only "area or in the immediate vicinity of an area."

II. THERE EXISTS A SERIOUS SAFETY ISSUE WHICH IS DIRECTLY IMPACTED BY THE DECISION OF THE EIGHTH CIRCUIT.

The centerpiece of the Administration's proposed safety legislation this Congress is a provision to deal with the

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[6] We submit that the originally adopted amendment was even clearer by the modifying clauses being in parenthesis. *See* 49 U.S.C. § 62 (repealed 1994), *supra* at 2-3.

problem of fatigue. *1998 Hearings* at 203. There can be no justifiable disagreement that there exists a direct relationship between fatigue and accidents. *See, e.g.*, H.R. Rep. No. 91-469, 91st Cong., 1st Sess. 6 (1969); and *1998 Hearings*. Stress in the workplace, resulting from long and irregular work hours, has long been a source of concern for railway workers, and has recently come to the attention of society at large. When Congress amended the HSA in 1976, it was primarily concerned about the health and safety problems presented by sleeping quarters located in railroad yards. Congress intended that such sleeping quarters eventually be removed from the yards, and it prohibited any major reconstruction of their existing sleeping quarters. Keeping employees housed at locations where they cannot get proper rest creates a major fatigue problem. This has been shown to result in health problems as well. *See Bailey v. Norfolk and Western Railway Co.*, 942 S.W.2d 404 (Mo. App. 1997).

Accidents caused by human error have consistently been a significant portion of the total number of railroad accidents occurring in any given year. In the past seven years railroad accidents caused by human error have accounted for approximately one-third of all train accidents. Preliminary statistics for 1997 also show that 33% of the accidents were caused by human error. *1998 Hearings* at 804.

According to Dr. Charles Czeisler, then Director of Circadian and Sleep Disorders Medicine at Brigham and Women's Hospital in Boston, "because their reaction time is affected . . . sleep deprived people may be more prone to making mistakes on the job." New York Times, May 15, 1990, at C8. Indeed, sleep researchers indicate that sleepiness is second only to drunkenness as a cause of automobile accidents.

James Hall, Chairman of the NTSB, testified at the 1998 Hearings that "[h]uman fatigue in transportation

operation is probably the most widespread safety issue in the transportation industry, and it has been an item on the Safety Board's 'Most Wanted' list of transportation safety issues since its inception in 1990." *1998 Hearings* at 317.

He stated in his prepared testimony that "[t]he current railroad hours of service laws permit, and many railroad carriers require, the most burdensome fatigue-inducing work schedule of any federally regulated transportation mode in this country." *1998 Hearings* at 460. We submit that one of the greatest contributing factors to such fatigue is requiring tired employees to try to obtain rest in busy and very noisy rail yards, in sleeping quarters that have persons constantly talking, walking, laughing and banging doors in the hallways 24 hours a day.

James L. Kolstad, former Chairman of the National Transportation Safety Board, addressed the fatigue issue before Congress, stating:

> Human performance is still the most important factor in any accident, in any mode of transportation. An operator who is inattentive, for whatever reason, can expect to find himself in an accident sooner or later. Too often, that inattention is caused by fatigue.
>
> Railroad employees, especially train crews, are confronted by very unpredictable and tiring work schedules—a situation that has not changed since the beginning of railroading. The changing nature of railroad operations and competitive factors have increased the relative number of crew members and others in safety sensitive positions who must work irregular and unpredictable shifts—often on a long term basis.

Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. at 167 (1991).

Also, Mr. Kolstad said that "[w]e have found in accident after accident that workload and work/rest issues have been critical factors." *Id.* Fatigue continues to be on the 10 Most Wanted list of the NTSB. *1998 Hearings* at 317. *See also Transportation Appropriations: Hearings Before the Subcommittee on Transportation of the House Committee on Appropriations,* 102d Cong., 1st Sess. 152 (1991) (statement of James L. Kolstad, Chairman, National Transportation Safety Board).

The FRA itself has undertaken several studies of the issue related to fatigue. *See Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 and DOT-VNTSC-FRA-91-1 (February, 1991), and *Engineman Stress and Fatigue: Pilot Tests,* U.S. Department of Transportation, Federal Railroad Administration, DOT/FRA/ORD-92-17 (June, 1992) (Discussed in *1998 Hearings* at 793-794). In the earlier study, one of the findings was that eight hours off duty seldom translates into more than four hours sleep because of the time required to get a motel and eat, coupled with the fact that sleep will be interrupted by a telephone call two hours before the next job starts. *See 1998 Hearings* at 793-794. The sleep records of engineers in the study were irregular and atypical when compared with non-engineer participants. *Id.*

Based upon the serious consequences to safe railroad operations that arise from the opinion of the Eighth Circuit in ruling contrary to the regulatory authority granted by Congress to the FRA, this case warrants review by the Court.

CONCLUSION

Based upon the conflict in three circuits and the significant safety issue involved, we respectfully request that the Court grant the petition.

Respectfully submitted,

Of Counsel:

CLINTON J. MILLER, III
General Counsel
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

LAWRENCE M. MANN *
ALPER, MANN & WEISBAUM, P.C.
1730 K Street, N.W.
Suite 1107
Washington, D.C. 20006
(202) 298-9191

* Counsel of Record

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